Office-Supreme Court, U.S.
FILED
SEP 11 1964
JOHN F. DAVIS, CLERK

No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1964

HAROLD KANTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 378

HAROLD KANTER, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* order of the court of appeals (R. [illegible];[1] Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered [illegible] June 12, 1964 (R. 164, Pet. App. A). A petition [illegible] rehearing *en banc* (R. 192–217) was denied on [illegible]y 22, 1964 (R. 253, 255; Pet. App. B). Mr. Justice [illegible]dberg extended the time for the filing of a petition [illegible] a writ of certiorari to and including August 11, [illegible], and the petition was filed on that date. The

[1] "R." designates petitioner's appendix in the court of appeals, [illegible]pplemented by the proceedings in that court.

743-751—64

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the introduction into evidence of the Minifon recording of petitioner's offer of a bribe to an Internal Revenue agent violated petitioner's privilege against self-incrimination.

2. Whether there was entrapment as a matter of law.

3. Whether the admissibility of evidence of petitioner's offer of a bribe should have been tested under standards applicable to confessions.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of unlawfully giving a bribe ($100.00) to an agent of the Internal Revenue Service with intent to influence the agent in the exercise of his official conduct, in violation of 18 U.S.C. 201 (R. 4–5, 157). Petitioner was sentenced to imprisonment for one year and a day (R. 160–161). The court of appeals unanimously affirmed (R. 164; Pet. App. A).

The evidence adduced at trial may be summarized as follows:

In the early evening of March 2, 1960, two agents (Kiely and Moran) of the Internal Revenue Inspection Service entered a bar in New York City known as the "African Room" (R. 9–10; 115). A "facet" of the agents' purpose in making this visit was to conduct a retail liquor dealer's inspection to deter-

mine if any adulterated liquor was being sold on the premises (R. 88). The overall purpose was to "check out" information received by the agents that violations of the liquor laws had occurred in the "African Room" and that petitioner and others had, in the past, bribed Internal Revenue agents (R. 34–37, 85–88; 120–121).

Agent Moran entered the premises first and took a seat at the bar (R. 10, 115). About five minutes later agent Kiely entered and told petitioner—who had approached and asked the agent if he could help him—that he was an Internal Revenue agent and was there to conduct a retail liquor dealer's inspection (R. 10–11, 55; 69; 115–116).[2]

After inspecting about fifteen or twenty bottles of liquor chosen at random, agent Kiely told petitioner that he wanted to take six bottles which he had reason to believe should be analyzed by a United States Chemist (R. 14, 16, 19, 35; 116).[3] Petitioner told Kiely that he did not understand how anything could be wrong with the bottles. Petitioner then went over to speak to his father, seated at the other end of the bar, who "passed something" to him (R. 15, 117). On petitioner's return, he asked the agent to accompany

[2] Such an inspection is conducted by introducing a chemical substance, known as "Williams Reagent," into the alcohol which discloses the alcohol's proof and whether any coloring has been added (R. 12–14).

Agent Kiely testified that the inspection was "[v]ery simple" to perform and that he had made one in a previous case about two years before (R. 90).

[3] Agent Kiely testified that samples from these six bottles revealed that the liquor was "either off in color or in proof" (R. 91).

him downstairs to the storeroom where the liquor was kept (*ibid.*).

As he followed petitioner downstairs, agent Kiely activated a Minifon recording device concealed on his person and commenced to record his conversation with petitioner (R. 28, 30, 57, 60). The recording was introduced into evidence by the government and played for the jury (R. 33). Agent Kiely testified that the Minifon was not activated earlier because he wanted to "conserve the battery power", that he had no idea how long the subsequent conversation with petitioner would last, and that while he was upstairs conducting the tests on the liquor there was no conversation to record (R. 57–58, 84).

When they arrived in the storeroom, petitioner told agent Kiely that he could not understand how anything could be wrong with the liquor and that he was a "very close personal friend" of Vic Singer[4] (R. 15–16). Petitioner then asked the agent not to take any bottles from the premises. Kiely explained that his doing so was no indication of wrongdoing, but meant simply that the agent wanted the expert opinion of a United States Chemist (R. 16, 19). At this juncture, petitioner "slid across the packing table" to the agent five twenty-dollar bills, saying: "That is for you. Don't take the bottles" (R. 18, 16–17). When Agent Kiely responded that this was "risky business", petitioner assured him that nobody would ever find

[4] Singer was an investigator of the Alcohol and Tobacco Tax Division (R. 16). Agent Kiely had information that Singer had previously been bribed by the petitioner (R. 34–36, 86, 120–121).

out and that Vic Singer would vouch for him (R. 18–19). The agent took the money [5] and the two men went back upstairs (R. 19, 23). Shortly thereafter, agent Kiely, without taking the bottles with him, left the premises, nodding to agent Moran on his way out (R. 20, 117–118). Some fifteen or twenty seconds later, agent Kiely returned and placed petitioner under arrest for bribery (R. 21, 118).

ARGUMENT

The instant case is virtually indistinguishable from *Lopez* v. *United States*, 373 U.S. 427, and does not call for further review.

1. There is no substance to petitioner's argument that the playing of the Minifon recording of his conversation with agent Kiely had the same legal effect as if he had been forced to testify against himself at trial and thus violated his privilege against self-incrimination. Just as agent Kiely—or any one else—could testify to petitioner's incriminating words and the deeds with which he was charged, so could a recording of the conversation be introduced into evidence to corroborate the agent's testimony. Indeed, as this Court recognized in *Lopez* v. *United States, supra*, 373 U.S. at 439, such a recording is "the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." [6]

---

[5] Prior to going to the "African Room", agent Moran had searched agent Kiely and removed all the money he then had on his person (R. 29–30; 114–115).

[6] Petitioner (Pet. 12–13) seeks to draw a sinister inference from the fact that Agent Kiely did not record his conversation

2. Petitioner's contention that he was entrapped as a matter of law is baseless. The record shows that the agent did not, either directly or by implication, ask for or suggest a bribe. That the agent informed petitioner that he wanted to take certain bottles of liquor for testing by a government chemist, simply indicates that he was carrying out his duties [7] and not, as petitioner would have it, that he was engaged in "a baseless accusation," (Pet. 19) to prompt a bribe offer. There was not even a factual issue of entrapment, let alone entrapment as a matter of law. In any event, the trial judge in his instructions submitted the issue of entrapment to the jury (R. 149–150) and no exception was taken to his charge (R. 154).

3. Equally groundless is petitioner's claim—which assumes that there was a real entrapment issue—that the admissibility of the recording of petitioner's offer of the bribe should have been tested under the same standards as if it were a confession. Petitioner's offer to the agent was not a confession; it was the very activity which constituted the crime. Whether in the form of Agent Kiely's testimony, or in petitioner's own words as contained on the wire recording of the conversation, these statements were properly introduced into evidence.

---

with petitioner before they went down to the storeroom. But as the agent fully explained, he was desirous of conserving battery power and while they were upstairs there was no conversation to record (See R. 57–58, 84; Statement, *supra*, p. 4).

[7] Agent Kiely testified that he advised petitioner that removal of the liquor for further testing did not constitute a charge that the liquor had been adulterated (R. 16, 19).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

SEPTEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964